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Moral Rights in Copyrights: The Theoretical Establishment

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Abstract

The main components of moral rights are two: the right of attribution and the right of integrity. However, beyond these, there are additional moral rights, some of which have been recognized by certain jurisdictions. These include: the right not to be attributed as the creator of a work that is not one's; the right to prevent others from claiming ownership of a work created by the original author; the right to publish a work anonymously or under a pseudonym; the right to withdraw consent to the publication of a work; the right to decide whether to disclose or refrain from publishing a work; and finally, the right to access the work. These elements are also facing increasing challenge due to the advancement of artificial intelligence. This right is realized by granting the creator the right to demand that his name be mentioned on or in connection with his work. The second right is the "right to the integrity of the work" and is the protection of the creator's work from damage, manipulation and other actions that harm the work or its integrity. But in this context, copyright law seems to fall short of this right. Instead, it largely reflects the image of the romantic creator, while also being appropriate for the individual commercial creator and corporate works. Furthermore, there is a recognition that the creative process is not solitary; it develops over time and involves ongoing interaction between users and creators. Users of creative works are, in part, new interpreters and creators, while others serve solely as interpreters of existing works. Copyright law therefore fails to embrace – and to a significant extent excludes – patterns of collaborative creation that fall outside corporate frameworks, thereby ignoring new creative processes that are developing today. These processes are made possible by the techniques and technologies provided by the digital age.

Keywords: right of attribution, right of integrity, AI, Bern Convention, TRIPS Agreement, Personality Theory, Hegel, Kant, Fichte, Utilitarian, Work Theory, Locke, Postmodernism, Bourdieu, Foucault.

1. Introduction

1.1 *What is the Moral Right?*

The primary components of the Moral Right are twofold: the right of attribution and the right of integrity. However, beyond these, additional Moral Rights exist, some of which have been recognized by certain jurisdictions.

These include: the right not to be attributed as the creator of a work that is not one's own; the right to prevent others from claiming authorship of a work created by the original author; the right to publish a work anonymously or under a pseudonym; the right to withdraw consent for the publication of a work; the right to decide whether to disclose or withhold a work; and, finally,

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the right to access the work. These elements, too, are increasingly challenged by advancements in Artificial Intelligence.

This right is realized by granting the right to the creator to demand that his name be mentioned on his work or in relation to it. The second right is "the right to the integrity of the work" and is the protection of the creator's work against damage, manipulation and other actions that damage the work or its integrity.

The center of gravity of this part of the moral right is not in the possible effect of the changes on society's attitude to the creator, but in the effect of the changes on the creator himself while emphasizing his personality characteristics and dignity (Weissman, 2009).

From this we learn that it is a set of rights separate from the economic rights arising from copyright, but at the same time it must be clarified that it is legal rights, despite the name that may mislead; Indeed, the scholars Wiseman and Tedsky proposed to call the moral rights "personal rights" (Weissman, 2009) or "spiritual rights" (Tedsky, 1980).

In addition to the two main rights mentioned above, Moral Rights also include secondary rights such as: The right to publish a work anonymously or using pseudonyms; the right to withdraw consent to the publication of the work; the right to disclose or not to disclose the work; And finally, the right to access the work (Nimmer, 2011).

1.2 *The absorption of the moral right*

The continental legal system, led by France and Germany, developed the Moral Right as a legal construct intended to safeguard the connection between the creator and their work, even after the creator has relinquished the economic rights to the work (Greenman, 2009).

This right evolved concurrently in the 19th century through a reciprocal relationship between French jurisprudence and German theoretical frameworks. The Berne Convention for the Protection of Literary and Artistic Works (1886) (hereinafter: "Bern Convention") incorporated the two primary components of the Moral Right into international copyright law.

1.3 *Characteristics of the moral right*

The Moral Right differs significantly between the continental and Anglo-American legal systems. While Europe's Droit d'Auteur doctrine places the creator and their natural rights to their work at the forefront, the Anglo-American Copyright doctrine views copyright as a tool to encourage creativity for the benefit of society, emphasizing Utilitarian considerations (Greenman, 2009). However, it is important to note that this distinction is not absolute, as both legal systems recognize theoretical approaches from one another to varying degrees.

Regarding the duration of the Moral Right, the prevailing tendency among nations is to follow the provisions of the Berne Convention, which aligned the duration of Moral Rights with that of copyright protection. Consequently, the obligation to attribute the creator's name to their work exists as long as the work is under copyright protection. Once the copyright term expires and the work enters the public domain, there is no longer a legal obligation to attribute the creator (Parzanti, 2008).

Additional characteristics of the Moral Right include its inalienable and personal nature; it cannot be transferred and remains with the creator even if they hold no copyright in the work or have transferred the economic rights to another party. Moreover, Moral Rights also extend to derivative works, as derivative works are fundamentally based on the original creation (Greenman, 2009).

1.4 *International law and intellectual property*

Copyright law, like other branches of intellectual property law, is governed by international treaties, foremost among them the Berne Convention, alongside the TRIPS Agreement (1994) establishes rules for copyright protection and obligates member states of the World Trade Organization to adopt the substantive provisions of the Berne Convention, thereby regulating the trade aspects of intellectual property rights.

However, Moral Rights are the only rights under this framework that are not uniformly applied to all WTO member states (Khoury, 2009).

It can thus be said that Moral Rights, despite certain semantic differences, are fundamentally uniform. As scholars emphasizes, some legal systems integrate Moral Rights with the economic component of copyright law according to the "monist" approach. In contrast, other legal systems separate Moral Rights from economic rights in accordance with the "dualist" approach. Either way, these differences are largely semantic and are gradually diminishing over time as national laws increasingly conform to the principles of international law (Weissman, 2009).

In conclusion, it is important to clarify that Moral Rights, beyond their unique philosophical characteristics, are fully-fledged legal rights. Despite being termed Moral Rights, they are, in fact, legal entitlements protected by law. They are, therefore, enforceable through legal mechanisms rather than being mere ethical principles devoid of legal sanctions (Weissman, 2009).

Regardless of whether a given legal system separates Moral Rights from economic rights or unifies them under the umbrella of "copyright," the underlying purpose remains the same: to protect the creator's reputation on the one hand and the economic implications of that reputation on the other (Parzanti, 2008).

2. The property institution and Personality Theory in Copyright Law

The theoretical foundation of Copyright Law, as we know it today, originates in the 18th century in continental Europe, during the philosophical discussions about Natural Rights. It was at this time that the distinction was made between the economic rights and the personal rights of the creator within the intangible property framework.

2.1 *Personality Theory*

The Personality Theory justifies an individual's control over their property, viewing it as an expression of their inner personality in the external world. In the case of creation, it is seen as a formative expression of the creator's personality (Dagan, 2009).

According to the Personality Theory, the human connection to a creation is reflected in the way the work and the resources from which it was made encapsulate the creator's past and present experiences.

The clearer and more direct the connection between the formative resource and the creator, the stronger the justification for granting proprietary rights to the creator. The legal system supports this connection through the legal protection provided by the Moral Right. This is most clearly evident in the Moral Right, as the protection of such formative resources holds independent social and moral value (Dagan, 2009).

Based on the Personality Theory, rooted in Natural Law, exploiting a creation or using it without the creator's permission constitutes a violation of the creator's right to their personality

and an infringement on their liberty and autonomy as an individual (Pesach, 2009). The connection between Copyright and Personality Theory also extends to a broader level, relating to the general justification of property rights based on Personality Theory.

2.2 *Hegel, Kant and Fichte: The theoretical basis for personality theory*

The theoretical and philosophical basis of the Moral Right in Intellectual Property can be traced to the writings of Immanuel Kant, Georg Wilhelm Friedrich Hegel, and Johann Gottlieb Fichts, specifically the personality theory developed by Hegel and Kant. These writings were profoundly influenced by the Romantic movement, which guided the philosophical discourse and cultural creation of the 19th century (Adeney, 2009).

In his writings from the late 18th century, Fichte differentiated between the tangible printed copy and its content, as well as between the intellectual expressions written in the printed work and the form in which those expressions were conveyed. According to Fichte, the abstract ideas, upon their publication, became part of the public domain. However, the tangible copy and the economic rights derived from its dissemination remained the exclusive property of the creator (Adeney, 2009).

In essence, Fichte relied on the theory that the creator's rights over their works originate from their ownership of the tangible copy. Once this foundation was laid, the theory justifying Copyright based on personality theory, as proposed by Kant, began to develop during the same period (Adeney, 2009; Galily, 2023).

Kant's moral philosophy developed the concept of the creator's autonomy, expressed through their works. In his 1785 essay On the Wrongfulness of the Unauthorized Publication of Books, Kant establishes the creator's right, through the proprietary rights of the publisher, over their works, including the creator's right to make changes to their work (Zarader, 2015).

Kant's most prominent expression regarding the Moral Right was his assertion that the creator has the right to have their work attributed to them and not to others and to prevent its harmful use without their consent. In Kant's words, this is "*an inherent right in his own person, namely a right to prevent another making him address the public without his consent*" (Adeney, 2009).

Thus, by the late 18th century, the Moral Right was established in its two main aspects—integrity and attribution—in the writings of one of the most significant thinkers in philosophical thought.

Hegel expanded on Kant's personality theory and, in addition to asserting that the external expression of a creation represents the creator's inner self, sought to distinguish between inalienable cultural assets and transferable assets. Hegel cited as an example of essential characteristic that reflect the creator's personality, such as religious beliefs or aspirations, which cannot be transferred. The transfer of an internal asset that is inalienable would result in alienation from the creator's personality, affecting their inner essence and negating the autonomy and will that underpin their existence (Zarader, 2015).

2.3 *The foundation of the moral right in the Personality Theory and the difference between the continental law to Anglo-American law*

Kant and Hegel's Personality Theory gained legal recognition in the Moral Right as reflected in continental law. This legal system places significant weight on the creator's subjective perception of the harm done to their creation. Furthermore, a distinction is made between the German and French approaches to the Moral Right. The German legal system examines the

purpose of the foundational creation against the nature and scope of the changes made, assessing the extent of the harm to the creator's intellectual interests.

By contrast, the French legal system places greater emphasis on the subjective connection between the creator and their creation. Under the French approach, the creator has the right to prevent alterations to their work, as the right to integrity also encompasses the right to respect for the work, with all its implications for the creator's personality and dignity in their subjective perception (Khoury, 2009).

2.4 *The Utilitarian approach and Work Theory*

Beyond the personality theory, two additional central theories are used to justify the recognition of Copyright: the Utilitarian approach and the Labor Theory. A brief discussion of these two theories will help frame the focus on the personality theory as it pertains to the Moral Right.

The Utilitarian approach, often referred to as the "incentive argument," recognizes Copyright to encourage the creation and dissemination of expressions, works, and other abstract goods with societal value. This purpose is achieved by providing economic incentives through the granting of Copyright. The Utilitarian approach recognizes Copyright when it benefits society as a whole, as the creator serves as a public agent and a means of promoting the public interest rather than being viewed as an independent entity deserving protection (Zarader, 2015).

The Labor Theory, sometimes referred to as the "reward argument," is a perspective that views Copyright as a fair reward owed to the creator for the effort and resources invested in producing the protected work. This theory is primarily based on considerations of justice and fairness and derives from the philosophy of John Locke. According to Locke's property theory, when an individual takes a natural resource, provided by God, and enhances it with labor and creativity, that resource becomes their property (Zarader, 2015).

However, it is worth noting that while Locke himself did not explicitly address intellectual property in the context of Copyright, scholars have interpreted his theory as providing a foundation for the justification of intellectual property rights (Zarader, 2015).

The Anglo-American approach does not place significant emphasis on the Moral Right or the integrity of the work and does not base the Moral Right on the Personality Theory. Instead, this approach prioritizes the Utilitarian rationale for Copyright. Nevertheless, in recent years, the Personality Theory has gradually gained traction within the Anglo-American legal framework.

2.5 *Over-application of the Personality Theory*

At this stage, it can be stated that the primary strength of the Personality Theory lies in its justification of the creator's personal rights and Moral Rights (Pesach, 2009). In practice, the fundamental assumptions of the Personality Theory have permeated copyright law as a whole, including the economic aspects of copyright.

One example of this, as demonstrated by Scholars, is found in the originality requirement, which is an integral part of copyright law in various legal systems. Although this requirement reflects the foundational assumption of the Personality Theory regarding the personal and immediate connection between the creator and the work—an assumption that should ostensibly apply only to Moral Rights and not to other economic rights—originality has, in practice, become a condition for recognizing copyright as a whole, including its economic aspects.

This recognition demonstrates that existing legal doctrine sometimes suffers from an over-application of the Personality Theory and its assumptions, even to areas that are neither based on the Personality Theory nor intended to fulfill its underlying objectives (Pesach, 2009).

The over-application of the Personality Theory can lead to unjustified and unwarranted harm to various external interests, all while relying on the theory as presented in this chapter. Conversely, such over-application does not necessarily undermine the foundation justifying the existence of Moral Rights. As argued earlier, the most distinct manifestation of the Personality Theory lies within the framework of Moral Rights.

Thus, it can be said that the connection between Moral Rights and the Personality Theory remains robust. Moral Rights are grounded in the creator's personality traits and protection against harm to their dignity. The excessive application of the Personality Theory should not lead to the conclusion that the strength of Moral Rights needs to be diminished (Tsekov, 2016).

At this point, I will turn to a discussion of 20th-century sociological thought to explore the justification for the existence of Moral Rights in light of postmodernist philosophy and the evolution of the creative field during this period.

Having laid the philosophical foundation for the development of the Moral Right, we shall now turn to Modern and Postmodern philosophical theories and their perspectives on the Moral Right (Tsekov, 2024).

3. A Sociological analysis of contemporary society in the context of Copyright Law

3.1 *Postmodernism*

Although there is no concept that garners greater resonance among intellectuals across a wide array of academic fields today, the precise meaning of the term “Postmodern” remains a matter of controversy. In a nutshell, Postmodern theory challenges the validity of the assumptions underpinning Modernist theory, which aimed to ground its analyses and critiques of society on universal, ahistorical, and rational foundations.

Instead, Postmodern theorists question the ability of Modern theory to encompass all social and historical phenomena and cast doubt on the pretensions of Modern theories to provide comprehensive and far-reaching answers to the questions occupying human culture. Postmodern thought is divided into various theories that collectively form the framework of Postmodern philosophy.

Initially, Structuralist theory emerged, followed by Post-Structuralist theory, and eventually the Postmodern Social theory. Due to the brevity required here, this is not the place to delve into the distinctions between these 20th-century theories. Moreover, it has always been challenging to precisely delineate the boundaries between these theories, particularly between Post-Structuralist and Postmodern theories (Ritzer, 2006).

Nevertheless, it is important to clarify that the thinkers whose terms I will employ are categorically aligned with the Structuralist school of thought. Structuralism is primarily concerned with linguistic structures, positing that meanings, consciousness, and ultimately the social world are shaped by the structure of language. In contrast to the existentialist worldview (as articulated by Jean-Paul Sartre), which envisions individuals shaping their environments, Structuralist theory asserts that the social world is shaped by the structure of language.

Having now laid the groundwork for both Postmodern and Structuralist theory, I will proceed to analyze the tools that will later assist me in examining the justification for the existence of the Moral Right.

3.2 *Bourdieu and the Field of Cultural Production*

The Structuralist approach, to which the French sociologist Pierre Bourdieu belongs, posits that social phenomena do not occur independently or in isolation from one another. Instead, these phenomena occur structurally, within a superstructure that directs and organizes them.

Bourdieu's central argument is that the dominant class in the structure of capitalist society is the one that holds economic, social, and even symbolic power, power embodied in economic and cultural capital, integrated into societal institutions and practices, and perpetuated through these very institutions and practices (Lechte, 2009).

According to Bourdieu, cultural production is regulated within a Field, an organized space of human knowledge. Bourdieu critiques the field as serving the narrow interests of stakeholders, aiming instead to analyze inequality and class distinction structurally rather than ideologically. As Bourdieu states: "A field is a structured space, an arena of power, it has dominant and dominated agents, and it is characterized by ongoing, enduring relations of inequality that prevail within this space.

It is also a battlefield for the preservation or transformation of these power relations." Each agent within the field is defined by their position in the space and competes with others using the resources at their disposal, which in turn determine their status and control within the field (Lechte, 2009).

A complementary concept to the field is Cultural Capital—one of Bourdieu's seminal contributions. Cultural Capital refers to an individual's ability to utilize cultural assets for broader control over societal resources, such as art, religion, and education.

As elaborated by scholar Michael Birnhack, Copyright Law engages with the Field of Creation, wherein the law itself constitutes a "field" shaped by reciprocal interactions and power struggles among agents and institutions operating within it. In the field of creation, numerous actors are involved, foremost among them the creators themselves. However, intermediaries such as employers, commissioners of works, and various facilitators also play critical roles, alongside the audience—the users of creative works (Birnhack, 2009).

Copyright Law serves as a central arena where the law intersects with the field of creation, influencing internal power dynamics, providing incentives to different players, and shaping their behaviors. This legal intervention exists alongside other influencing factors such as market forces, social norms, and technological advancements.

Copyright Law seeks to intervene in general cultural content and direct it toward objectives deemed desirable by legal creators. However, according to Birnhack, Copyright Law also has a meta-cultural aspect, as it not only determines cultural content and meanings in society but also influences the very way meanings are formed (Birnhack, 2009).

Thus, we see that the law shapes the cultural categories of creators and the creative process, with the choice of a particular cultural category amounting to no less than a value-based decision.

3.3 *Foucault and the ųoncepts of "Power" and "Discourse"*

Michel Foucault, one of the most prominent French sociological thinkers of the 20th century, introduced two highly relevant concepts for our discussion: "Discourse" and "Power." To begin with the concept of Discourse, Foucault argued that it does not necessarily represent language but rather a system that structures reality and mediates between human experiences and how individuals relate to them. Foucault's notion of Discourse seeks to explain how knowledge is defined and organized within a specific framework and, just as importantly, whom the Discourse serves. By employing prohibitions and permissions regarding the subject of the Discourse, the object of the Discourse, and its mode of expression, the bearer of the Discourse supervises and excludes those deemed undesirable from engaging with it.

Discourse significantly limits the potential scope of conversation, as the speaker is subject to a system of norms, interpretations, and disciplines tied to a specific theoretical field (Lechte, 2009).

The second concept relevant to our discussion is Power, which Foucault described as a "network" of relations spread like "capillaries" throughout society, defying reduction to a single dominant entity such as the state or economic elites.

Foucault did not view Power as something exclusively possessed by certain groups or institutions and absent from others. Instead, he identified political power with the law and its enforcement mechanisms, while also recognizing other manifestations of Power in modern societal institutions, from prisons to psychological and psychiatric professionals. This is exemplified in his work *Madness and Civilization: A History of Insanity in the Age of Reason* (Lechte, 2009).

Finally, Foucault proposed defining Power as a system of relationships where all parties have a capacity for action and a range of responses, meaning that all sides retain a degree of freedom. According to this definition, Power relations can, in imbalanced situations, involve one party restricting the other, but they can also be relationships of cooperation or even mutual creation (Arbel, 2006).

4. Conclusion – Application of theoretical frameworks in Copyright Law

Foucault's concepts of "Power" and "Discourse" function effectively within the framework of Copyright Law. As international law and national legislation define the creation, the creator, and the beneficiaries of rights, they simultaneously create a Discourse that allocates Power to some while revoking it from others. This occurs within a framework where seemingly equal actors compete for the right to benefit from the fruits of creation defined by the Discourse. "To exercise Power relations, there must be some form of freedom on both sides," Foucault writes in his work *The Ethic of Care for the Self* (Arbel, 2006).

As can be seen in legal disputes generally, and in copyright specifically, the opposing parties possess a degree of freedom and tools for engagement that, within the legal process, appear to be equal.

Instead of explaining the mechanisms of Power in society through interests or intentions, Foucault suggests using terms like strategies and tactics, which arise as solutions to problems within given constraints. In this framework, the ability of one party (in Foucault's context, the bourgeoisie) to exert control is not the result of deliberate action but emerges from systemic strategies (Arbel, 2006).

The battlefield, as Bourdieu describes it, in which struggles over the structure and attribution of the structured space occur, plays a significant role in the field of creation. Regarding

the creative process, Copyright Law grants creators substantial control over their works and their uses, and consequently over the interpretations that can be attributed to them.

It appears, then, that Copyright Law does not encompass all types of creators or all types of creations. Instead, it largely reflects the image of the Romantic creator while also accommodating the individual commercial creator and corporate creations. Moreover, there is recognition that the creative process is not solitary; it unfolds over time and involves ongoing interaction between users and creators. Users of creative works are, in part, interpreters and new creators, while others serve solely as interpreters of existing works.

However, there are positive aspects within the existing law, such as recognition of intertextuality and even a Postmodern interpretive approach that acknowledges the fluid, dynamic, and ever-changing nature of meaning. Meaning is not fixed at a single point but arises within the space between the creator, the creation, other works, and the users themselves (Birnhack, 2009).

Nevertheless, Copyright Law fails to embrace—and to a significant extent excludes—collaborative creation patterns that fall outside corporate frameworks, thereby overlooking new creative processes emerging today. These processes are facilitated by the techniques and technologies provided by the digital age (Fomteau, 2024).

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C O A S